No. 17-961

IN THE

SUPREME COURT OF THE UNITED STATES

THEODORE H. FRANK and MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, on behalf of herself and all others similarly situated, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NEW YORK BAR FOUNDATION and THE NEW YORK STATE BAR ASSOCIATION AS *AMICI CURIÆ*

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N.Y. COMP. CODE R. &
REGS. tit. 22, § 1200,
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N.Y. COMP. CODE R. &
REGS. tit. 22, § 1200,
Rule 1.5 (2018) 14

N.Y. COMP. CODE R. &
REGS. tit. 22, § 1200,
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N.Y. COMP. CODE R. &
REGS. tit. 22, § 1200,
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N.Y. COMP. CODE R. & REGS. tit. 22, § 1200, Rule 3.3 (2018) 14

N.Y. COMP. CODE R. & REGS. tit. 22, § 1200, Rule 3.4 (2018) 14

N.Y. COMP. CODE R. & REGS. tit. 22, § 1200, Rule 4.1 (2018) 14

N.Y. COMP. CODE R. & REGS. tit. 22, § 1200, Rule 8.3 (2018) 14

N.Y. COMP. CODE R. & REGS. tit. 22, § 1200, Rule 8.4 (2018) 14

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W. VA. R. CIV. P. 23 19

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American Law Institute, PRINCIPLES OF THE LAW, AGGREGATE LITIGATION § 3.07 (2010) 16, 17

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Martin H. Redish, Peter Julian, and Samantha Zyontz, *Cy Pres Relief and the Pathologies of Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 717 (2010) 13 n.4

The New York Bar Foundation (the "Foundation") and the New York State Bar Association (the "Association") submit this brief *amici curiæ* with respect to the decision of the United States Court of Appeals for the Ninth Circuit approving the use of a *cy pres* remedy in a Federal Rule of Civil Procedure 23(b)(3) class action.[1] This Court should affirm that decision's underlying holding that district courts have broad discretion to approve or apply such a remedy when appropriate. The experiences of the Foundation and the Association, including those described in this brief, are good examples of why such discretion furthers not only the purposes of Federal Rule of Civil Procedure 23, but the ends of justice.

STATEMENT OF INTEREST OF *AMICI CURIÆ*

Founded in 1950, the Foundation is the charitable arm of the Association. The Foundation sponsors charitable and educational projects to meet the law-related needs of the public and the legal profession. Its activities include financial support to

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[1] No counsel for a party authored this brief in whole or in part. No party or counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici curiae*, their members, or their counsel, made any such monetary contribution to the preparation or submission of this brief. Neither this brief nor the decision to file it should be considered to reflect the views of any judicial member of the Association or the Foundation. All parties have consented to the filing of this brief.

programs that facilitate the delivery of legal services, improve the justice system and the law, increase public understanding of the law, and enhance professional competence and ethics. The Foundation has received, and distributed to such programs, *cy pres* amounts from approximately 30 different class-action settlements since 2008. In this process, it has been entrusted with several significant appointments to oversee the use by specific recipients of approximately $4.4 million in such amounts. The Foundation therefore has significant insight and firsthand experience that may benefit the Court as it considers how *cy pres* actually works in class-action settlements.

The Association is the largest voluntary state bar association in the country. It is also one of the most prominent. (Among other things, a former Chief Justice of this Court was once its president.) Its stated objectives are to cultivate the science of jurisprudence, promote reform in the law, facilitate the administration of justice, and elevate the standards of integrity, honor, professional skill and courtesy in the legal profession. As part of this mission, the Association is the drafter of the New York Rules of Professional Conduct. The Appellate Division of the Supreme Court of the State of New York adopts those rules (subject to any final changes by the court before adoption) as the ethical standards applicable to all attorneys licensed to practice in New York. Attorneys who violate those rules are subject to discipline up to and including disbarment. Because those rules govern the behavior of lawyers in connection with their

representation of parties in class actions, including class-action settlements involving a *cy pres* remedy, the Association's experience may benefit this Court as it considers such remedies.

SUMMARY OF ARGUMENT

Neither the Foundation nor the Association is an organization dependent on *cy pres* funding. The Foundation has, however, substantial experience assisting courts in supervising the use of *cy pres* funds from class-action settlements to make sure that such use matches the court's intentions. *See, e.g., City of Detroit v. Grinnell Corp.*, Nos. 68–cv–4026, 4027, & 4028 (LAP) (S.D.N.Y. 2010); *Charrons v. Pinnacle Group*, 874 F. Supp. 2d 179 (S.D.N.Y.), *aff'd sub nom. Charrons v. Weiner*, 731 F.3d 241 (2d Cir. 2012); *White v. First Advantage Saferent, Inc.*, No. 1:04–cv–1611 (LAK), 2007 U.S. Dist. LEXIS 18401 (S.D.N.Y. Mar. 7, 2007).

The Foundation's experience has demonstrated that, contrary to Petitioners' arguments, *cy pres* provides an essential flexibility to district courts seeking to assure the fairness, reasonableness, and adequacy of Rule 23(b)(3) class action settlements. *See generally* FED. R. CIV. P. 23(e). There are strong existing protections against abuse of that flexibility, including not only the procedures of Rule 23 itself, but regulations and laws such as the ethics rules promulgated by the Association. Given these protections, there is no basis for the Court to consider a general bar to the use of *cy pres* remedies on the current record. Any

consideration of such a radical step would be a matter better left to policy-making institutions such as the Congress or the Federal Rules Advisory Committee.

ARGUMENT

This Court should affirm that *cy pres* remedies may be used in connection with appropriate settlements involving classes certified under Federal Rule of Civil Procedure 23(b)(3). The experience of the Foundation, and the protections against abuse such as those promulgated by the Association, strongly support the continued availability of *cy pres* to enable district courts to assure that such settlements achieve their just purposes.

I. The experience of the Foundation demonstrates the importance of *cy pres* remedies for certain class-action settlements.

The Federal Rules of Civil Procedure require that any class-action settlement that would bind absent class members be evaluated *individually* to determine whether it is "fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2). As a result, "although certain factors must be considered and certain procedures complied with, much of the judicial oversight of class actions," including in settlement, "is in the sound discretion of the district judge." *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1344 (9th Cir. 1980), *abrogated on other*

grounds by Evans v. Jeff D., 417 U.S. 717, 725 n.10 (1986).

District courts also "have historically had broad authority to fashion equitable remedies . . . ." *Carlson v. Green*, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting); *accord, e.g., Conn. Office of Protection & Advocacy for Persons with Disabilities v. Hartford Bd. of Ed.*, 464 F.3d 229, 245 (2d Cir. 2006); *Hardison v. Cohen*, 375 F.3d 1262, 1266 (11th Cir. 2004). Because "[j]udicial *cy pres* is part of the 'regular and inherent jurisdiction [of] a court of equity'," *Pennsylvania v. Brown*, 260 F. Supp. 323, 337 (E.D. Pa. 1966) (quoting *Fontain v. Ravenel*, 58 U.S. 369, 397 (1854) (Daniel, J., concurring)), it is not surprising that federal courts have been using it carefully since at least the early 1970s in the context of class-action settlements, *see, e.g., Miller v. Steinbach*, No. 66 Civ. 356, 1974 U.S. Dist. LEXIS 12981, at *3 (S.D.N.Y. Jan. 3, 1974).

This ongoing use of *cy pres* is consistent with a recognition that adopting "[p]er se rules rigidly confining the trial court's exercise of its discretion in the supervision of class actions" would "represent the abdication of judicial discretion rather than its informed exercise." *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1133 (7th Cir. 1979). The Foundation's own experience shows how the informed use of *cy pres* in appropriate class-action settlements furthers the aims of Rule 23(e)(2) and is, with appropriate checks and balances, an essential tool for district courts.

A. The Example of *City of Detroit v. Grinnell Corp.*

The problem that arose in *City of Detroit v. Grinnell Corp.*, Nos. 68–cv–4026, 4027, & 4028 (LAP) (S.D.N.Y. 2010), is a good example of the importance of being able to use *cy pres* in connection with certain class-action settlements. The *Grinnell* cases date back to 1961. They are familiar to this Court because of its landmark decision in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). Following the conclusion in 1967 of that government action concerning price-fixing in the market for provision of residential "central station alarm systems"—an early form of electronic data-collection and response services—private plaintiffs filed a number of similar cases in the federal courts under the Sherman Act, 15 U.S.C. §§ 1–2. *See City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1095-98 (2d Cir. 1977) (describing history).

Those private actions were settled in 1972 for $10,000,000 (an enormous amount at the time). *See City of Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1390 (S.D.N.Y. 1972). Multiple appeals produced, among other things, a leading decision on the factors for approval of class-action settlements. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974).

What did not happen, however, was a prompt exhaustion of the entire $10,000,000 settlement fund. An inability to find good addresses for distribution of settlement amounts to certain

claimants meant that a modest residue of approximately $100,000 remained in an interest-bearing account. Decades passed with no additional plaintiffs being located. Over thirty years later, the executor of the estate of one of the original lead counsel in the cases discovered the account. By that time, the modest residue had grown to over $850,000. *See* Order Approving Distribution of Residual Settlement Funds at 3, *City of Detroit v. Grinnell Corp.*, Nos. 68–cv–4026, 4027, & 4028 (LAP) (S.D.N.Y. Dec. 14, 2010) (the "*Grinnell* Cy Pres *Order*").

The district court resolved this problem with a *cy pres* remedy. *See id.* The technology and business originally at issue in the early 1960s had long been superseded by developments such as the internet. The class members were also long gone or unfindable. But the issue of competition in the market for provision of data services remained. So did the need for entrepreneurial small businesses to foster that competition.

The district court recognized this by rejecting a suggestion by class counsel to distribute the remaining settlement funds to medical research. *Cf.* Memorandum of Law in Support of Motion To Authorize Distribution of Residual Settlement Funds, *City of Detroit v. Grinnell Corp.*, Nos. 68–cv–4026, 4027, & 4028 (LAP) (S.D.N.Y. June 11, 2010).[2]

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[2] As this indicates, the Association and the Foundation agree that it is entirely proper for a district court to conduct a "rigorous analysis" of proposed recipients of *cy pres* funds as

Instead, it approved a proposal to have the Foundation oversee grants to two entities. One was a major research university's center for technology, innovation, and competition. This was an entity that could help improve competition in services that might be considered descendants of the technology in the early 1960s. The other was a specialized entrepreneurship training program for disabled veterans delivered by a network of leading business schools. This was an entity that could not only help foster small businesses of the kind that had been harmed in the original *Grinnell* cases, but that would include ethics training to encourage fair competition. *See, e.g.*, *Grinnell* Cy Pres *Order*; Letter from Lesley F. Rosenthal, Howard L. Schechter, & Daniel Berger to Hon. Loretta A. Preska, Chief Judge, *City of Detroit v. Grinnell Corp.*, Nos. 68–cv–4026, 4027, & 4028 (LAP) (S.D.N.Y. Nov. 20, 2010). As a result, the $850,000 in residual funds from a case over a generation old was put to work for the public benefit in ways well tailored to serve the ends of the original class-action settlement.

B. The Example of *Charrons v. Pinnacle Group*

A second example of why the flexibility offered by *cy pres* can be essential in some settlements is *Charrons v. Pinnacle Group*, 874 F. Supp. 2d 179 (S.D.N.Y.), *aff'd*, 731 F.3d 241 (2d Cir. 2012). The

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part of its duties under Rule 23. *See, e.g., Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

Charrons case was a class action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–68 (2017), and the New York Consumer Protection Act, N.Y. Gen. Bus. Law § 349(a) (McKinney 2018). It challenged the setting and charging of fraudulently high rents to "approximately 20,000" tenants of rent-regulated apartments in "over 400 buildings." *Charrons v. Weiner*, 731 F.3d 241, 244–45 (2d Cir. 2012) (upholding settlement over challenge by objectors).

Eventually the parties were able to resolve those disputes. Their settlement included an informal claims-administration process outside the court system under which tenants could pursue their highly diverse alleged losses. *Id.* at 246. The total amount that would be paid (or not) in that process was not a fixed settlement fund. *See id.* However, the parties also agreed (in a settlement provision visible to class members in advance for purposes of objections and opt outs) to pay "[u]p to $2,350,000 . . . to the Legal Aid Society and Legal Services NYC (to be administered by the New York Bar Foundation) for legal and related assistance in implementing the terms of the Settlement Agreement." *Charrons*, 874 F. Supp. 2d at 187.

Under this settlement structure, the Foundation was appointed to oversee the amount granted to the designated legal-service providers. *Id.* While the $2,350,000 at issue was not called a *cy pres* payment, it was in fact a distribution of funds that did not go directly to class members—precisely the kind of payment that Petitioners believe is

improper. *See, e.g.*, Brief for Petitioners, *Frank v. Gaos*, No. 17–961 ("Pet. Br."), at 49 (U.S. July 9, 2018) ("*Cy pres* awards are inappropriate . . . if it is feasible to distribute cash to *any* absent class members."). Yet the importance of providing knowledge and assistance to the class generally in the *Charrons* settlement could not be denied. It was, in fact, necessary to enable class members' use of the claims-administration process at the heart of the settlement, enhancing their access to justice.

C. The Example of *White v. First Advantage Saferent, Inc.*

The Foundation's supervision of the use of $1,210,116 in *cy pres* amounts from the settlement of *White v. First Advantage Saferent, Inc.*, No. 1:04–cv–1611 (LAK), 2007 U.S. Dist. LEXIS 18401, at *8–9 (S.D.N.Y. Mar. 7, 2007), provides a third example of why it is important for district courts to have discretion to approve such remedies in appropriate settlements. The *White* case was a class action challenging the defendants' sales to landlords of "a list of individuals who have been involved in landlord–tenant litigation." *Id.* at *3. The way Defendants aggregated and sold this publicly available information allowed landlords to "blacklist" and reject prospective tenants based solely on whether they had ever been parties to a landlord–tenant action, no matter what the outcome of that action. While legal in theory, the list ended up stigmatizing certain tenants unfairly. *See id.* at *4.

To resolve these claims, the parties in *White* agreed to a settlement including some changes in the list and the creation of a settlement fund of $1,900,000. *Id.* at *4–5. The settlement provided in advance that "[a]ny part of the $ 1.9 million left [over] . . . would be donated to appropriate governmental and/or charitable entities 'to further the goal of increasing awareness of tenant screening and the duties and obligations under' pertinent laws." *Id.* at *5.

Given that the class members were a highly transient population of low-income tenants, often difficult to locate or loath (for a variety of reasons) to participate in a court-related proceeding, there was in fact a residue left over from the settlement fund. The Foundation was selected to ensure that this residue was distributed to, and properly used by, appropriate entities for the designated purposes stated in the settlement. The funds were provided to multiple legal-services providers, a housing-court task force, and an advocacy project for neighborhood economic development. These entities in turn used the funds to provide housing court "hotlines" that handled thousands of calls; to staff help stations (in multiple languages) at housing courts; to prepare and disseminate training materials on tenant screening (including online materials with forms for removal of names improperly included on screening reports); and to provide training both to landlords and tenants on tenant screening. The result was to help prevent, and to help remedy, the improper screening that had been the injury at the heart of the underlying case. Had *cy pres* not been available,

the only choice would likely have been to allow the residual funds to escheat to the state. The *cy pres* remedy defined in the settlement itself and approved by the district court certainly fit the specific goal of the plaintiffs in *White* better than a payment into the general fund of the State of New York would have. *See generally In re Xpedior Inc.*, 354 B.R. 210, 233–41 (Bankr. N.D. Ill. 2006) (explication of some of the issues in the debate about escheat versus *cy pres*).

II. There are strong existing protections against abuse of *cy pres* remedies.

As the examples above show, *cy pres* remedies can be not only beneficial, but essential in ensuring that justice is done in connection with certain Rule 23(b)(3) class-action settlements. *See also, e.g.*, Brief of the American Bar Association as *Amicus Curiae* in Support of Neither Party, *Frank v. Gaos*, No. 17–961, at 5, 9–14 (U.S. July 16, 2018) (benefits of *cy pres* remedies in access to justice). Petitioners do not now argue that the Constitution or any federal statute directly precludes the use of *cy pres* to achieve these results.[3] Nor have they provided

[3] The closest Petitioners come is an assertion that *cy pres* remedies could "infringe upon the First Amendment rights of class members by requiring them to subsidize political organizations they disapprove of without their explicit consent." Pet. Br. at 17. But this risk, if it exists at all, is not a widespread one like the compulsory "agency fees" paid by public employees to labor organizations. *See Janus v. Am. Fed'n. State, County, and Mun. Employee, Council 31*, 138 S.

record evidence of the frequency of any supposed abuse of the remedy, or demonstrated that district courts simply "rubber stamp" requests for it. In fact, as the *Grinnell* case shows, district courts do reject particular *cy pres* requests and appellate courts do reverse *cy pres* remedies when that use is deemed improper in a particular case. *See, e.g., Klier v. Elf Atochem N. Am.*, 658 F.3d 468, 479 (5th Cir. 2011); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).[4]

Given this lack of record evidence of a widespread problem with the discretionary use of *cy pres* remedies, this Court should not discount the already strong existing protections against efforts to cause abuse of that discretion. For example, the rules of ethics promulgated by the Association, and adopted by the Appellate Division of the Supreme Court of the State of New York to govern all lawyers licensed in New York, *require* lawyers in class actions to maintain loyalty to their respective clients, candor with the courts in which they appear, reasonableness in fees, and avoidance of prejudice to

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Ct. 2448, 2463–64, 2484–85 (2018). In any event, such issues are simply not ripe for consideration on this record.

[4] The statistical analysis in Martin H. Redish, Peter Julian, and Samantha Zyontz, *Cy Pres Relief and the Pathologies of Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 717 (2010), is not to the contrary. The authors admit that they removed from their incomplete data set all instances where courts "rejected a *cy pres* award." *Id.* at 652 & n.163. This means their analysis is not meaningful in determining whether district courts do a good job exercising discretion or not.

the administration of justice. *See, e.g.*, N.Y. COMP. CODE R. & REGS. tit. 22, § 1200, Rules 1.1(c), 1.2(a), 1.5(a), 1.8(g), 3.1, 3.3(a), 3.4(a), 4.1, 8.3(a), 8.4(a), (c), (d) (2018). Attorneys can be, and are, disciplined for violations of these rules. Each restriction the rules impose is therefore a barrier to the specter of pervasive *cy pres* misuse, "gamesmanship," and conflicts raised by Petitioners. *See, e.g.*, Pet. Br. at 22–49, 54–56.

Nor are such ethical protections unique to New York. Every state has similar rules. Every United States district court (including the one that approved the *cy pres* remedy in this case) imposes those rules, or similar rules, on the lawyers appearing before it. *See Resolution Trust Corp. v. Bright*, 6 F.3d 336, 341 (5th Cir. 1993) (citing *In re Snyder*, 472 U.S. 634, 645 n.6 (1985)); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (2000). In addition, the behavior of lawyers advocating for *cy pres* remedies is subject to malpractice claims with respect to that issue. *See, e.g., Vermont Pure Holdings, Ltd. v. Berry*, No. 06–01814 (BLS1), 2010 Mass. Super. LEXIS 71 (Mass. Super. Ct. Feb. 8, 2010). *See also, e.g., Ferguson v. Lieff, Cabraser, Heimann & Bernstein*, 69 P.3d 965 (Cal. 2003). *See generally Wyly v. Weiss*, 697 F.3d 131 (2d Cir. 2012); *Achtman v. Kirby, McInerney & Squire, LLP*, 464 F.3d 328 (2d Cir. 2006); *Thomas v. Albright*, 77 F. Supp. 2d 114 (D.D.C. 1999), *aff'd sub nom. Thomas v. Powell*, 247 F.3d 260 (D.C. Cir. 2001).

And even beyond rules of ethics and threats of malpractice liability, the Federal Rules of Civil Procedure give a protection directly to each class member with respect to any undesired *cy pres* remedy. Under Rule 23(c)(2)(B)(v), absent members of a class certified under Rule 23(b)(3) must receive notice and the opportunity to opt out. This requirement means that if any class member disagrees with a particular *cy pres* remedy, that class member can choose not to participate in the settlement.

As the experience of the Foundation demonstrates, settlement documentation can often enhance this protection by addressing in advance the use of *cy pres* with respect to residual funds. *See, e.g.*, Amended Stipulation of Settlement, *Zwickel v. Taro Pharm. Indus. Ltd.*, No. 04–cv–5969–RMB, at ¶ 8 (S.D.N.Y. Mar. 25, 2013) (typical residual clause providing that "[a]ny amount remaining . . . after all payments are made . . . shall be re-distributed" down to a minimum per-class member amount after expenses and that "[i]f any funds remain," the residue will be "contributed to [a] . . . charity to be agreed upon by the parties and approved by the Court."), *as included at page 7 of "so ordered" application approving distribution to the Foundation. See also West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 734 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971) (notice that if a class member did not opt out of the class, and also did "not file a claim, this latter choice constitute[d] an authorization for use for the benefit of all citizens of the government entity involved (in such manner as

the Court might direct)." And if settlement documentation does not address a *cy pres* remedy for residual funds in advance, district courts have the power, under Rule 23(e)(4), to order further notice if necessary. (Of course, if a court properly applies practices such as those in the American Law Institute's PRINCIPLES OF THE LAW, AGGREGATE LITIGATION (2010) (the "ALI PRINCIPLES"), *see infra* at 18–19, a class will have no meaningful claim to any residual amount, and thus no need of further notice. *See generally* Wilber H. Boies and Latonia Haney Keith, *Class Action Settlement Residue and* Cy Pres *Awards: Emerging Problems and Practical Solutions*, 21 VA. J. SOC. POLICY & THE LAW 267 (2014).)

III. Existing policy-making institutions are well suited to address the issue of *cy pres* remedies in class-action settlements generally.

As the experiences of the Foundation show, *cy pres* can provide necessary solutions to unique problems in certain Rule 23(b)(3) class-action settlements, all consistent with the command and intent of Rule 23(e)(2). To the extent that Petitioners or certain *amicus curiæ* have asserted any valid policy concerns about *cy pres* remedies in the abstract, however, there are better ways to address them than a general rule devised from this one particular case.

The American Law Institute, for example, has studied *cy pres* in class-action settlements at some

length. *See* ALI PRINCIPLES § 3.07. That study has produced not only a general statement of the law consistent with the views of *amici* in this brief, but also a set of "best practice" principles to advance the law. *See id.* § 3.07 cmt. a.

Those principles are simple. First, distribute settlement proceeds directly to class members if that can be done with reasonable effort in an economically viable way. *Id.* § 3.07(a). Second, redistribute any leftovers unless the amounts are too small, or doing so would be impossible or unfair. *Id.* § 3.07(b). Third, if distribution or redistribution is not viable, have the parties identify one or more *cy pres* recipients "whose interests reasonably approximate those being pursued by the class." *Id.* § 3.07(c). Fourth, if that is not possible, then the "court may approve a recipient that does not reasonably approximate the interests being pursued by the class." *Id.* A number of courts have begun using these principles as guidance in the exercise of their discretion in particular cases with respect to distribution of proceeds from class-action settlements, to apparent good effect. *See, e.g., id.* § 3.07 and *cases cited in cumulative annual pocket part.* The principles appear to be working.

The Federal Rules Advisory Committee (the "Committee"), another entity well suited to deal with policy issues of the kind raised abstractly by Petitioners, recently considered *cy pres* in connection with proposed revisions to Rule 23. While not a principal focus of the Committee at the time, the identification of the issue nonetheless produced

substantial public commentary. *See, e.g.*, Advisory Comm. on Civ. R., AGENDA BOOK FOR MEETING IN AUSTIN, TEX., at 137, 147–48, 152–54, 162, 164, 167, 183, 186–87, 189, (Apr. 25–26, 2017), *available at*: http://www.uscourts.gov/sites/default/files/2017-04-civil-agenda_book.pdf. Given commentary received, the Committee decided to defer action on the issue. It chose not, for example, to rush to propose rules along the lines of what Petitioners wish this Court to impose by fiat.

Finally, together with the current status of the Committee's proceedings, the absence of federal legislation forbidding or limiting *cy pres* remedies matters. Legislatures are well able to consider the policy issues involved in the use of *cy pres* remedies generally. The legislatures and rules advisory committees of numerous states, of widely varying political sensibilities, have considered such matters, particularly as to residual funds in class-action settlements. *Compare, e.g.*, CAL. CIV. PROC. CODE § 384 (Deering 2018) *with* N.C. GEN. STAT. § 1–267.10 (2018). These state policymakers also typically recognize that courts must still have discretion with respect to any *cy pres* remedy, either as to an entire amount or as to a defined portion of it. *Compare, e.g.*, COL. R. CIV. P. 23(g)(2) (at least 50% of residual funds must go to the Colorado Lawyer Trust Account Foundation, but the balance may go "to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified

class") *with* HAW. R. CIV. P. 23(f) (complete discretion given to court "to approve the timing and method of distribution . . . and . . . the recipient(s) of residual funds, as agreed to by the parties"). *See also, e.g.*, CAL. CIV. PROC. CODE § 384(c); CONN. PRAC. BOOK § 9–9(g)(2); 735 ILL. COMP. STAT. 5/2–807 (2018); IND. R. TRIAL P. 23(f); KY. CIV. R. 23.05(6); LA. SUP. CT. R. XLIII § 2; MASS. R. CIV. P. 23(e)(2); ME. R. CIV. P. 23(f)(2); N.C. GEN. STAT. § 1–267.10(b); NEB. REV. STAT. 25–319.01(2) (West 2018); N.M. R. ANN. 1–023(G)(2) (Michie 2018); OR. R. CIV. P. 32(O)(2); PA. R. CIV. P. 1716(b); P.R. LAWS ANN. tit. 32A, app. V, R. 20.6(b) (2017) (no official translation); S.C. R. CIV. P. 23(e)(2); S.D. CODIFIED LAWS § 16–2–57 (2018); TENN. R. CIV. P. 23.08; WASH CIV. R. 23(f)(2); W. VA. R. CIV. P. 23(f)(2); WIS. STAT. § 803.08(10)(b)(1) (West 2018).

The United States Congress and the Federal Rules Advisory Committee can obviously consider the same array of policy issues considered by independent organizations such as the American Law Institute, or by state rules advisory committees, or by state legislatures. Those federal institutions are no less well suited to resolving such issues than their nongovernmental counterparts or state equivalents. If they choose not to do so, that does not mean that this Court must then assume a general policy-making role through the imperfect vehicle of a specific litigated case.

CONCLUSION

This Court should affirm that, while the inclusion of a *cy pres* component is not required under Federal Rule of Civil Procedure 23(e) to settle a case, district courts have broad discretion to approve or apply such a remedy when appropriate.

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